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IN THE

Supreme Court of the United States

No. 70-17

THOMAS S. EISENSTADT

v.

WILLIAM R. BAIRD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

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INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.

Human Rights for Women, Inc., is a non-profit tax exempt organization, incorporated in the District of Columbia in December, 1968. Its purposes are to provide volunteer legal assistance in litigation involving the rights of women under the law, to undertake research on issues of discrimination against women, and to provide for educational projects on the conditions of women.

Human Rights for Women has devoted its efforts to furnishing legal counsel to women in cases involving sex discrimination in employment. HRW has also argued for the right of all women to terminate unwanted pregnancies. Unwanted or untimely childbearing is strongly linked to employment discrimination in that employers continue to use childbirth as an excuse for not hiring women. The fact that Title VII of the 1964 Civil Rights Act was intended to prohibit such discrimination does not prevent it from occuring.

Human Rights for Women seeks to place *all* women, married or single, on an equal footing with men, not only with respect to job opportunities, but in all aspects of their lives.

We disagree with Appellant that there does not exist a right of single persons to sexual relations without unwanted pregnancy (Brief, p. 16), and we believe that denial of this right works a particular hardship on single women. It is a commonly understood principle assumed by social scientists of wide ranging backgrounds that the expression of one's sexuality is fundamentally linked to the development of one's personality, and to the general mental, emotional, and physical well-being of the individual.[1] Thwarting such expression causes deep psychic disturbance and inability to adjust to the ordinary problems of living. Women suffer emotional disturbance on a much larger scale than men.[2] We maintain that one reason for this is the continued existence of the Double Standard in sexual matters, with its attendant suppression of female sexuality, as sanctioned by laws such as the one herein challenged.

We are not advocating "free love." We are simply saying that the law should not restrict what is a matter of individ-

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[1] 6 Harvard Civil Rights Civil Liberties L. R. No. 2, "A Little Dearer than his Horse"—Legal Stereotypes and the Feminine Personality, pp. 271-283, p. 263 n. 26, and Maslow, A. H., "Self-Esteem and Sexuality in Women," Journal of Social Psychology, 1942, Vol. 16.

[2] P. Chesler, "Psychotherapy and Women," paper presented to the annual convention of the American Psychological Association (1970).

ual and very personal choice in light of the person's own moral, ethical, religious, or esthetic values.

> "There is a sacred realm of privacy for every man . . . where he makes his choices and decisions, fashions his character and directs his desires, a realm of his own essential rights and liberties, including, in the providence of God, liberty to go to the devil, into which the law, generally speaking, must not intrude." Archbishop of Canterbury, quoted in Chesser, *Live and Let Live* 58 (1958).

In accordance with Rule 42(2) of the Rules of this Court, the Special Assistant Attorney General of the Commonwealth of Massachusetts and attorneys for Appellee have given written consent to the filing of an *amicus curiae* brief by Human Rights for Women, Inc.

QUESTIONS PRESENTED

1. Does Appellee have standing?

2. Is Massachusetts G. L. c. 272, § 21 unconstitutional on its face?

STATEMENT OF THE CASE

In April, 1967, Appellee was arrested, charged, and convicted of violating Mass. G.L. c. 272, § 21[3] following a lecture on birth control at Boston University where he allegedly handed a container of contraceptive foam to an

[3]Chapter 272, § 21 reads: "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not

unmarried adult woman. On review, the Massachusetts Supreme Judicial Court invalidated that portion of the statute which prohibited "exhibiting" a contraceptive device, on First Amendment grounds, but upheld the portion prohibiting "delivery" of such a device. Baird's petition for a writ of habeas corpus was dismissed by the United States District Court for the District of Massachusetts. On appeal to the United States Court of Appeals for the First Circuit, the court held the statute unconstitutional on its face as being arbitrary and grossly discriminatory and having no legitimate legislative purpose. *Baird v. Eisenstadt*, 429 F.2d 1398 (1970). This is an appeal under 28 U.S.C. § 1254(2) by the State of Massachusetts from the decision of the Court of Appeals, First Circuit.

ARGUMENT

I. APPELLEE HAS STANDING TO ASSERT HIS RIGHTS AND THE RIGHTS OF SINGLE WOMEN.

a. The statute prohibits the dispensing of contraceptives by *anyone* to a single person. Appellee would be guilty under the same statute even if he were a physician.

b. Appellee occupies a role in relation to single women that is analogous to doctor and patient, *Griswold v. Connecticut*, 381 U.S. 479 (1965), to the NAACP and its members, *NAACP v. Alabama*, 357 U.S. 449 (1958), and to a Caucasion selling his property to a non-Caucasion in violation of a racially restrictive convenant, *Barrows v. Jackson*,

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more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Following this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), holding unconstitutional a Connecticut statute that forbade married persons from using contraceptives, the Massachusetts legislature enacted a law specifically allowing contraceptive devices for married people. Mass. G.L. c. 272, § 21A.

346 U.S. 249 (1953). Appellee has spent the greater part of his adult life fighting for the right of single people to birth control. He has held himself out to be, and is accepted as, the representative of single people in this issue. For this reason there is a logical nexus between Appellee's status and the claim of single people he seeks to adjudicate. And the rights of the latter are likely to be diluted or adversely affected if not considered in a suit involving one who represents them in this way.

II. THE STATUTE VIOLATES THE RIGHT OF PRIVACY GUARANTEED BY THE NINTH AMENDMENT.

This Court has never held that the Bill of Rights protects only those rights that the Constitution specifically mentions by name. Other rights are recognized by this Court as emanating from the Bill of Rights: the right to be free from segregated public education, *Bolling v. Sharpe*, 347 U.S. 497 (1954); the right to travel, *Kent v. Dullus*, 357 U.S. 116 (1958); the right of military personnel to vote where they establish residency, *Corrington v. Rash*, 380 U.S. 89 (1965); the right not to produce membership lists, *NAACP v. Alabama*, 360 U.S. 240 (1959); the right to teach one's children German, *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right to educate one's children in private schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); the right to privacy in matters pertaining to marriage, family and sex, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to engage in sexual intercouse without unwanted pregnancy free from governmental intrusion, has been stated by a three-judge federal court in *Roe v. Wade*, 314 F.Supp. 1217 (N.D. Tex. 1970).

We agree further with the decision in *Roe* which, in holding the Texas abortion law unconstitutional, stated that the statute deprived "single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children," and pointed out

> The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of the individual. *Id.*, at 1221.

Restrictions on birth control are even more an invasion of privacy than restrictions on abortion. As this Court stated in *Griswold*, "Would we allow the police to search the sacred princincts of marital bedrooms for telltale signs of the use of contraceptives?". Certainly, the bedroom of a single woman should be at least as private and free of state interference. Indeed, a bedroom (birth control) is entitled to an even greater degree of privacy than the doctor's office (abortion).

While the Massachusetts legislature should be commended for its concern in safe-guarding the morals and chastity of the single people of that state, such concern is not compelling enough to adversely affect the right of single women to sexual relations free of unwanted pregnancy.

III. THE STATUTE VIOLATES FUNDAMENTAL RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The statute challenged herein controls the lives of single women as effectively as if there were steel bars around them. Forcing a single woman to expose herself to the risk of unwanted pregnancy as *payment* for fundamental rights is so harsh a price as to effectively deny those rights.

There is nothing more demanding upon the body of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later. The possession and control of her body is effectively taken from her, in contradiction to the right of every person to give his time energy and skill only if he so chooses and for adequate compensation. This right was recognized in the last century:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

a. The statute denies single women the equal protection of the law in that

(1) It discriminates against them in favor of married women. The statute penalizes single women who assert state sanctioned rights granted married women. Although society favors marriage, *a woman should not have to marry in order to exercise fundamental human rights.*[4]

(2) It discriminates against them in favor of single men. Although the stattue is also intended to prevent single men from access to contraceptives, the effect on them is about as meaningful as a law denying them maternity leave. That is, the effect on single men is nil, while the effect on single women is drastic. A mere accident of biology—the fact that women have a uterus and men do not—is used to diminish single women's fundamental freedoms under the law. Men do not risk pregnancy with the non-use of contraceptives, and the unwed father is simply not comparable to the unwed mother in terms of social stigma, disruption of life plans, and the risk to life and health that accompany pregnancy.

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[4]The right to birth control regardless of marital status has been affirmed by the Planned Parenthood Federation of America, the United Nations International Conference on Human Rights (Proclamation of Tehran, May, 1968), by the Citizens Advisory Council on the Status of Women (56 A.B.A.J. 41, Jan. 1970), and the Department of Health, Education and Welfare *requires* that federally-supported state programs providing contraceptive services do so without regard to marital status (Social & Rehabilitation Service program regulation 50-1, 34 F.R. 1241, 1242, Jan. 25, 1969).

b. The statute denies single women due process of law in that it arbitrarily invades the privacy of their lives with no reasonably related benefit to health, safety, morals, or the general welfare, or any other compelling state interest. In fact, it serves no valid public purpose at all. On the contrary:

(1) The statute does not deter non-marital sexual relations.

> It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970).[5]

(2) The statute aggravates the desperate demand for illegal abortion.

(3) The statute causes "shot-gun" weddings, which studies show have a much higher rate of dissolution than other marriages.

(4) The statute creates unwanted children, who not only suffer a large share of that insideous crime known as "child-abuse,"[6] but also a higher rate of juvenile delinquency,

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[5]The 1955 American Law Institute Model Penal Code recommended exclusion from criminal prosecution "all sexual practices not involving force, adult corruption of minors, or public offences." § 207.5 The authors said that it was inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational, and other influences.

[6]Steel and Pollack, "Psychiatric Study of Parents Who Abuse Infants and Small Children," *The Battered Child*, University of Chicago Press (1968) p. 103.

failure in school, drug addiction, and mental illness, than do wanted children.[7]

(5) The statute causes untimely termination of education or loss of job, which frequently obligate society to assume support for the woman and child.

(6) Single women are denied, under the statute, the best medical care available under currently accepted medical standards.

c. The statute violates Appellee's due process rights because it serves no public purpose. Public Law 91-662, approved January 8, 1971, eliminated the Federal prohibitions (formerly contained in 18 U.S.C. 552, 1461, 1462 and 19 U.S.C. 1305(a)) against mailing or importing articles for preventing conception, except for unsolicited articles. Thus contraceptive foam, such as the foam involved in this case, can be ordered by single women in Massachusetts from other states by mail.[8] The Massachusetts statute now really serves only to harass people such as the Appellee.

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[7]Hans Forssman and Inga Thuwe, "One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused," Acta Psychiatrica Scandinavica, Vol 42 (1966). About half of all women seeking abortion are single women.

[8]Contraceptives could be obtained by single people from any place except Wisconsin, the only other state beside Massachusetts restricting the use of contraceptives by single people. *West's Wis. Stats. Annot.* § 151.15(4), renumbered § 450.11(4) by *1969 Laws*, ch. 336, § 106.

CONCLUSION

The judgment of the Court of Appeals for the First Circuit declaring Mass. G.L. c. 272, § 21 unconstitutional should be affirmed.

Respectfully submitted,

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